No. 1863

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION (a corporation),
Plaintiff, Plaintiff in Error,

vs.

C. H. LILLY, doing business as C. H. Lilly & Co.,
Defendant, Defendant in Error.

Petition for a Rehearing on Behalf of Plaintiff in Error.

WILLIAM THOMAS,
ROBERT N. FRICK,
LOUIS S. BEEDY,
JAMES LANAGAN,
Attorneys for Plaintiff in Error and Petitioner.

Filed this.....day of March, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The plaintiff in error respectfully submits that a rehearing of the above entitled matter be granted for the following reasons:

This court has placed its refusal to reverse the judgment on two grounds:

1st. That it was not reversible error to allow the witness Goldstein to be cross-examined on matters

pertaining to the subject of the direct examination for the latitude to be allowed on cross-examination is to be determined by the trial court in the exercise of its sound discretion.

2nd: That no substantial injury to the plaintiff resulted from the allowance of such cross-examination.

1st. It is said in the opinion:

"But whatever may be said of the reasons on "which the rule is ordinarily upheld, there is no "substantial reason why, in the exercise of sound "discretion, the court may not relax the rule in the "case of the cross-examination of a party to the "action. Here was a witness who was the vice-"president and treasurer of the plaintiff, and its "active agent in its transactions with the defend-"ant. To all intents and purposes he was the "plaintiff. He was introduced as a witness to tes-"tify as to his own acts. He was sworn to testify "to the whole truth. He produced in evidence the "statement of account which he had sent to the "defendant, together with the answer of the de-"fendant thereto, which, on its face, was an assent "to the statement and an acknowledgment of the "debt. He testified that no payment had been made "on the account or on the items of storage therein "specified. In presenting those papers he vouched "for their truth and he thereby asserted that the "goods had been sold and delivered as represented

" in the statement. He was examined in such a " way as to have him avoid testifying to the import- " ant facts which went to the merit of the contro- " versy, facts which were peculiarly within his " knowledge. In such a case, why should the de- " fendant be required to make the plaintiff a wit- " ness for the defense and be compelled to give " credit to the plaintiff's testimony as to the very " existence of his own cause of action?"

We do not believe, from the above, that we have made clear the nature of our objection to the allowance of the cross-examination. The objection of the plaintiff in error to the testimony as not proper cross-examination is not based alone on the fact that this testimony of Goldstein's was not reached in an orderly manner, or introduced at the proper time, or upon any reason relating to method or form merely. It goes deeper than that. The evidence was without the issues and should not have been received at any time or in any form. The only issues made by the pleadings are made by the allegations of the complaint that an account was stated, the denial in the answer of the statement of the account, and the affirmative defense contained in the answer, to the effect that the agreement to pay for the goods was induced by fraudulent representations. The evidence given by Goldstein on cross-examination was addressed to the question of whether title to the goods had passed to the purchaser, and as no issue was made on that point, it was not

material or competent. It was for this reason that the direct examination was closely confined to the proof of the allegations of the complaint, and there was no intention to examine the witness "in such a " way as to have him avoid testifying to the import- " ant facts which went to the merit of the contro- " versy". We believe that the defendant was justified in assuming that evidence of whether or not the sale had been completed was immaterial and incompetent and would not be allowed, for plaintiff was not informed by the answer that the defendant intended to rely on such defense, and could not reasonably be expected to foresee the introduction of such evidence.

It seems clear that in an action on account stated, the general denial puts in issue only the rendition of the account and the acquiescence therein by the defendant, and that any matter such as omission, fraud or mistake is an affirmative defense, and must be specially pleaded. If the defendant intended to rest his defense on the ground that when he had agreed to the statement of the account, he was acting under a mistaken belief as to the legal effect of the transactions had between the parties anterior to the statement of the account, he should have so alleged in his answer, that the plaintiff might have been prepared to meet the issue on trial. The learned court, in that part of the opinion quoted above, has assumed that the evidence adduced on cross-examination was material, and being material, the

method by which or the time at which it was introduced should properly be left to the discretion of the trial court, but as we have pointed out, the evidence was not material, and there was no opportunity for the exercise of discretion on the part of the trial court.

2nd. The court says, further in its opinion:

"But even if the witness Goldstein is not to be "deemed, technically speaking, the actual plaintiff "in the action, it is clear that the admission of his "testimony on the cross-examination was not error "for which the judgment should be reversed, for "the plaintiff was not injured thereby. *The de-* "*fendant could have called the witness in his own* "*behalf and could have elicited the same testimony* "*in his defense, Lukens v. Hazlett,* 37 Minn. 44. In "*Wallace v. Russell,* 100 U. S. 621, it was held that "where it appears that no injury has resulted to the "plaintiff in error, a judgment will not be reversed "merely because the court at the trial permitted a "witness on his cross-examination to be interro- "gated as to *matters pertinent to the issue,* but "about which he had not testified in chief."

It seems to us that the sentence ~~understood~~ in italics is the keynote to the opinion; this court taking the view that a new trial can be of no avail to plaintiff, because the evidence objected to will be introduced at some stage of the trial, and when so introduced will be absolutely fatal to plaintiff's case. But our contention is, that while the defendant could have called

the witness in his own behalf, he could *not* have elicited the same testimony; the reason, we have pointed out above. The testimony adduced was inadmissible under the pleadings. In

Wallace v. Russell, 100 U. S. 621,

the court says, as is stated in the opinion, that the judgment will not be reversed where no material injury has resulted to the plaintiff, because the trial court permitted the cross-examination of a witness on matters to which he had not testified in chief, but which "were pertinent to the issue", but in the case at bar, the evidence was not pertinent to the issue, and for that reason it seems to us that the admission of the evidence resulted in a very serious injury to plaintiff, and that a new trial should be granted. That facts do exist that would constitute a defense, if properly pleaded, to the cause of action stated in the complaint, can be no ground for refusing a new trial, for the defendant has waived such defense by failing to plead it. If the case is sent back for a new trial, the evidence elicited on cross-examination and on which the judgment of nonsuit was rendered, cannot be received either on cross or direct examination. We, therefore, respectfully request that a rehearing may be granted.

William Thomas,
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Louis S. Beedy,
James Lanagan,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF ATTORNEY.

I, one of the attorneys for plaintiff in error and petitioner, hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

WILLIAM THOMAS,
Attorney for Plaintiff in Error and Petitioner.